

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 17, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

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Appeal Nos. 2016AP1596-CR

Cir. Ct. Nos. 2012CF293

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN W. VAN DERA,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. A jury convicted Justin Van Dera of homicide by negligent use of a motor vehicle, operating after revocation, second-degree recklessly endangering safety, obstructing an officer, and three counts of misdemeanor bail jumping. The circuit court denied Van Dera's postconviction motion alleging ineffective assistance of trial counsel. On appeal, Van Dera contends that his trial counsel was ineffective and the evidence was not sufficient to convict him of bail jumping. We disagree and affirm.

¶2 The charges against Van Dera arose from an April 2012 automobile crash on Highway 44 in Winnebago County. The State theorized that Van Dera was driving aggressively, attempted to pass more than one vehicle, crossed into oncoming traffic, and started a chain of events that resulted in the death of Larry Lambrecht, who lost control of his vehicle as he attempted to evade Van Dera's vehicle. The State alleged that at the time of the crash, Van Dera was released on bond in a misdemeanor case and driving with a revoked license. Because Van Dera was on bond with a condition that he drive only if he was legally allowed to do so, Van Dera was charged with misdemeanor bail jumping. The State also charged Van Dera with recklessly endangering the safety of his nine-year-old backseat passenger, the child of his fiancée.

¶3 Although Van Dera denied driving erratically or having any role in the crash, he did not deny operating his vehicle in the vicinity of the crash. Van Dera's theory of the case was that he did not have contact with Lambrecht's vehicle, he was not in Lambrecht's lane of travel, and he played no role in Lambrecht's loss of control. Rather, Van Dera theorized that Lambrecht was either not driving carefully or he and his vehicle were impaired in some fashion. Van Dera argued that the crash scene witnesses who testified at trial about his role in causing the crash were not credible.

¶4 The jury convicted Van Dera.

¶5 Postconviction, Van Dera argued that his trial counsel was ineffective for failing to fulfill an expectation counsel created with the jury during his opening statement that the jury would view a videotaped interview of the child that would have supported Van Dera's exculpatory version of the facts. He also argued that trial counsel did not effectively argue that crash scene witnesses who testified that Van Dera was wearing a dark shirt were not credible because another witness testified that Van Dera was seen in a white shirt after the crash. After an evidentiary hearing featuring testimony from trial counsel and Van Dera, the circuit court rejected Van Dera's ineffective assistance of counsel claim.

¶6 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was deficient and that the deficiency was prejudicial. *State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. Both deficient performance and prejudice present mixed questions of fact and law. *Id.* We will uphold the circuit court's factual findings unless they are clearly erroneous. *Id.* However, we review de novo whether counsel's performance was deficient or prejudicial. *Id.*

Ineffective Assistance of Trial Counsel

Child's Videotaped Interview

¶7 Before trial, the parties discussed using the child's videotaped interview, and they agreed about which sections would be shown to the jury. In their opening statements, the State and Van Dera's counsel both informed the jury

that it would see a videotaped interview of the child.¹ During the State's case, in the presence of the jury, the court attempted to play the videotaped interview. The videotape would not play properly, and the court excused the jury. The court gave the parties an opportunity to find a way to show the videotape without defects. Upon returning to the courtroom, the jury was informed that the videotape had some technical problems, and the parties were going to try to make other arrangements to show the videotape or find another way to get the child's interview into the record. The videotape was never shown to the jury.

¶8 The next day, the child testified that he was in the car with Van Dera when the car shut down after Van Dera pulled over to the side of the road. He and Van Dera ran through yards and through a fence. A friend of Van Dera's picked them up. At trial, the child did not remember the trip on Highway 44, did not remember looking at Van Dera's speedometer, and did not remember any incident on Highway 44 where a car swerved. Although Van Dera's counsel cross-examined the child, counsel did not make any effort to impeach him with his prior interview statements about some of the same topics covered during the child's trial testimony.

¶9 Matters involving the videotape were addressed in postconviction proceedings. During postconviction proceedings, the State reminded the court that it made the decision to offer the videotaped interview at trial, and the defense had to respond to this decision. Trial counsel testified that as part of trial preparation,

¹ Van Dera foreshadowed that the child would testify that he was interviewed after the accident, and he told interviewers that the deceased's vehicle swerved into oncoming traffic, the child's seatbelt locked, and Van Dera swerved to avoid a head-on collision. Van Dera suggested that the child's interview would be consistent with the testimony of other witnesses and Van Dera's claim that he did not cause the crash.

he reviewed the child's videotaped interview. Counsel testified that some of the interview was helpful and some of the interview was unhelpful. Trial counsel conceded that he could have pressed the child on his lack of memory about the day of the crash, but doing so would have created a situation where the unhelpful portions of the child's interview could have come before the jury, i.e., that Van Dera had coached the child to state that they had been in a park and not in Van Dera's vehicle, the child could not confirm Van Dera's speed at the time of the crash, and the child was likely unable to see the speedometer from the back seat even though he stated that Van Dera was driving the speed limit on the day of the crash. Counsel testified that he discussed his concerns with Van Dera, and they agreed that the child would not be persuasive and could damage the defense given his statements that Van Dera had coached him. They agreed as a matter of trial strategy not to pursue the videotaped interview or cross-examine the child using the interview and that it was probably best to move on.

¶10 Van Dera testified that he recalled discussing the child's videotaped interview with his trial counsel. When the videotape malfunctioned, Van Dera claimed he offered his own copy of the videotaped interview, and he never agreed to forego showing the jury the videotape.

¶11 In ruling on the postconviction motion, the circuit court stated that it had reviewed the child's videotaped interview, and the interview was not "significantly advantageous" to Van Dera. The court found credible trial counsel's testimony that once the videotape malfunctioned, he and Van Dera considered the benefits and disadvantages of the interview and agreed to move on. The court characterized counsel's approach to the videotape as a strategic decision and concluded that counsel did not perform deficiently in this respect.

¶12 On appeal, Van Dera challenges the circuit court’s finding that trial counsel was more credible than he with regard to the decisions involving the videotape and the child’s trial testimony. “An appellate court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with nature or with fully established or conceded facts.” *State v. Daniels*, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983) (footnote omitted). Applying this standard, we have no basis to disregard the circuit court’s determination that trial counsel was more credible than Van Dera. The circuit court was in a better position than this court to weigh the credibility of trial counsel and Van Dera. *See State v. Hagen*, 181 Wis. 2d 934, 948-49, 512 N.W.2d 180 (Ct. App. 1994).

¶13 Van Dera focuses on his trial counsel’s unfulfilled promise to the jury to play the videotape. We are unpersuaded. The jury was aware of the technical difficulties with the videotape. Most importantly, we have sustained the circuit court’s finding that Van Dera agreed to forego use of the videotaped interview. Under these circumstances, the circuit court did not err in rejecting this ineffective assistance claim.

Failure to Challenge the Credibility of Crash Scene Witnesses

¶14 Van Dera argues that his trial counsel was ineffective in the manner in which he argued to the jury that two crash scene witnesses were not credible. At trial, a dump truck driver testified that he observed Van Dera’s vehicle travelling erratically and at a high rate of speed and passing several vehicles. The dump truck driver believed Van Dera was wearing a dark shirt. A Ford Escape driver testified to essentially the same facts. Another witness, a Walmart loss-prevention officer, testified that roughly one hour after the crash, Van Dera was

observed on Walmart’s security video wearing a white shirt. Van Dera faults trial counsel for not emphasizing the disparity in the descriptions of the color of his shirt on the day of the crash.²

¶15 Trial counsel testified that focusing on the shirt color issue would have been problematic because the jury could have viewed the possibility of a shirt change as evidence of guilt.

¶16 The circuit court rejected this ineffective assistance of counsel claim. The court noted counsel’s concern that the shirt color issue could be problematic for the defense so defense counsel did not pursue it vigorously. The court found that counsel’s approach to the shirt color issue was a strategic decision and not deficient performance.

¶17 On appeal, Van Dera argues that trial counsel performed deficiently when he did not explore more vigorously the varying testimony about his attire. Van Dera’s argument overlooks the circuit court’s finding that trial counsel had a strategic reason for his approach to Van Dera’s attire. This finding is not clearly erroneous based on this record. *Jeannie M.P.*, 286 Wis. 2d 721, ¶6. Counsel’s strategic decision was “rationally based on the facts and the law.” *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996). Trial counsel did not perform deficiently in this regard. *Id.*

² As the State points out, Van Dera’s fiancée testified that when she picked up Van Dera and her son, the child passenger, at Walmart after the crash, Van Dera was not wearing the same clothes he had been wearing earlier in the day. Van Dera and his fiancée were cohabiting at the time of the crash.

Sufficiency of the Bail Jumping Evidence

¶18 Van Dera does not dispute that there was sufficient proof of two of the three elements of misdemeanor bail jumping: he was charged with a misdemeanor and he intentionally failed to comply with the terms of his bond. WIS JI—CRIMINAL 1795. However, he argues that there was insufficient evidence for the third element: he was released from custody on bond when the crash occurred. *Id.* Van Dera’s sufficiency of the evidence argument is premised upon the absence of a signed bond form in Winnebago County circuit court case No. 2011CT918. Van Dera reasons that the absence of the signed bond form renders insufficient the evidence that he was actually released on bond when the crash occurred.

¶19 The State must prove each element of the crime beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We review the sufficiency of the evidence, direct and circumstantial, to determine whether the evidence, “viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Ray*, 166 Wis. 2d 855, 861, 481 N.W.2d 288 (Ct. App. 1992) (citation omitted). We must accept the reasonable inferences drawn from the evidence by the jury, which is the sole arbiter of the credibility of the witnesses. *Poellinger*, 153 Wis. 2d at 506-07. “[I]f more than one reasonable inference can be drawn from the evidence,” we must adopt “the inference which supports the conviction.” *State v. Hamilton*, 120 Wis. 2d 532, 541, 356 N.W.2d 169 (1984).

¶20 We conclude that the evidence at trial was sufficient to establish that at the time of the crash, Van Dera was out of custody on bond. The Winnebago County clerk of court testified that Van Dera was placed on bond in December 2011; the

crash occurred in April 2012. The bond conditions included that Van Dera not commit any crimes and drive only with a valid driver's license. The clerk testified that the bond form was mailed to Van Dera, but he did not sign the form. At the crash trial, the parties stipulated to an excerpt from the bond hearing in which the circuit court informed Van Dera that he was being released on a recognizance bond, he could not drive without a valid license, and he was not to violate any laws.

¶21 Van Dera's failure to sign the bond form did not negate the bond conditions ordered from the bench. "The judicial act is complete when the order is announced from the bench. Reducing it to writing is only a ministerial act to preserve the evidence of the order." *State ex rel. Hildebrand v. Kegu*, 59 Wis. 2d 215, 216, 207 N.W.2d 658 (1973). We conclude that the evidence was sufficient that Van Dera was released on a recognizance bond with conditions that he drive only with a valid license and not violate any laws. The evidence of misdemeanor bail jumping was sufficient.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16).

